Supreme Court, U.S.
FILED
AUG 1 2003
OFFICE OF THE CLERK

(3)

No. 02-1593

IN THE

SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; UNITED STATES BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, THE ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, THE NORTHWEST MINING ASSOCIATION, AND GRANITE CONSTRUCTION INCORPORATED IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents reserved to the United States "all the coal and other valuable minerals." Citing *Watt v. Western Nuclear*, 462 U.S. 36 (1983), the Ninth Circuit ruled that the Pittman Act reserved *all* sand and gravel as "valuable minerals," regardless of whether the materials at any given property had economic value at the time the land was patented.

The questions presented are:

(1) Whether the reservation of "valuable minerals" includes all common materials (such as sand and gravel), without regard to whether the materials located on particular lands were "valuable minerals" at the time of the patent; and

(2) If *Watt v. Western Nuclear* calls for the application of a *per se* rule regarding the reservation (or non-reservation) of common materials, whether congressional intent would be better served by a rule that common materials are *not* reserved to the government as "valuable minerals."

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INTEREST OF AMICI CURIAE[1]

The Associated General Contractors of America ("AGCA") is the largest and oldest of the national trade associations in the construction industry. It is a non-profit corporation formed in 1918 at the request of President Woodrow Wilson. AGCA now represents more than 33,000 firms in more than 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 14,000 material suppliers and service providers to the construction industry. AGCA has two chapters and approximately 700 members in Nevada, the state in which this case arose.

AGCA's members engage in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and the install utilities necessary for housing development. Their projects require vast quantities of sand and gravel and they therefore have a great and continuing interest in the cost and availability of these materials. A significant number of AGCA members also mine sand and gravel on western and other lands. In some instances, they are simply self-supplying the materials they need for their

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* certifies that counsel for a party did not author this brief in whole or in part and that no person other than *amici* made a monetary contribution to the preparation of this brief.

projects. In other cases, they also supply sand and gravel to other construction contractors.

AGCA seeks to ensure that construction contractors can efficiently support the physical infrastructure on which all Americans are heavily dependent for their quality of life. To that end, the association's bylaws require it "to promote fair and honorable dealings with the owners of construction projects ... and with all segments of the construction industry, including architects, engineers, specialty and subcontractors, and suppliers of materials and services." AGCA is committed to skill, integrity and responsibility.

AGCA's members have found that the cost of transporting sand and gravel is extremely high. Whether a construction project is cost effective often therefore depends on whether construction contractors can produce or purchase these materials relatively near the project. Where neither sand nor gravel, nor other aggregate, is available at reasonable prices, less infrastructure is likely to be built. Because Nevada is one of the fastest growing states in the United States from the standpoint of population growth and construction activity, AGCA members have a strong interest in the availability of sand and gravel resources in Nevada as well as in other western States.

As an *amicus curiae*, AGCA regularly participates in nationally significant cases in both state and federal courts, including the Supreme Court. As an *amicus curiae*, AGCA last appeared before this Court in *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001).

The Associated General Contractors of California ("AGCC") is the AGCA chapter for most of the state of California. AGCC is an independent but affiliated trade association of responsible construction contractors and

related firms, including sand and gravel producers. It is equally committed to skill, integrity and responsibility in the improvement of our physical environment. Founded in 1920, AGCC proudly represents more than 1,100 firms, including general contractors, specialty contractors, material suppliers, and other businesses servicing the construction industry in California. AGCC is the voice of California's construction industry, and is committed to improving the performance of its members and the construction industry as a whole. AGCC members operate not only in California, but also nearby western states such as Nevada.

Northwest Mining Association ("NWMA") is a 107-year-old, 2,000 member non-profit, non-partisan trade association founded in Spokane, Washington during the early years of the Coeur d'Alene Mining District. NWMA was soon supporting the mining industry throughout the states of Alaska, Idaho, Montana, Oregon, and Washington, the provinces of Alberta and British Columbia, and the Yukon and Northwest Territories. NWMA's members rely on an abundant and economical source of sand and gravel for road building and other construction activities which are ancillary to mining operations.

Today, NWMA is a regional association representing members' interests throughout the United States and Canada, and facilitating their global interests. NWMA serves in the role of the state mining association for Oregon and Washington, working closely with sister organizations representing the aggregate industry. It also works closely with the National Mining Association and state mining associations in the western United States, as well as provincial and regional mining associations throughout Canada.

NWMA is recognized throughout the world as an innovative and proactive leader in addressing the needs of an increasingly global mining industry. Today, its members reside in 40 U.S. states, 9 Canadian provinces or Territories, and 15 other countries.

NWMA's purpose is to represent and inform members on legislative, regulatory and technical issues, to support and advance the mineral resource and related industries, to provide for the dissemination of educational materials related to mining, and to foster and promote economic opportunity and environmentally responsible mining.

Incorporated in 1922, Granite Construction Incorporated builds roads, tunnels, bridges, airports and other infrastructure-related projects used by millions of people – all of which require an affordable source of aggregates like sand and gravel. In addition, Granite Construction produces sand, gravel, ready-mix and asphalt concrete and other construction materials. Unusual among large contractors, Granite Construction handles both large and small jobs through its two operating divisions. The Branch Division serves local markets in the West and builds smaller, shorter duration projects. The Heavy Construction Division builds larger, more complex projects, nationwide. Granite Construction operates projects in California, Nevada, and more than fifteen other states. Granite Construction is a member of AGCA and AGCC.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling in this case is overbroad and a threat to vital sand and gravel resources and the property rights of western landowners. This Court should grant the writ of certiorari requested in this petition and reverse the court below.

ARGUMENT

I. Background of Petitioners' Case

The Pittman Act was part of Congress's decades-long effort to encourage settlement of the American West through land grants to those who would lead the way. *See* 41 Stat. 293-95 (1919). It authorized permits for individuals to explore for subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands . . . in the State of Nevada." *Id.* Prospectors who discovered and successfully developed an underground water source could obtain patents for up to 640 acres of land. Such patents reserved to the United States "all the coal and other valuable minerals," which in turn would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." Pittman Act § 8, Petitioners' Appendix ("Pet. App.") at 67a.

Common sand and gravel were abundant on Pittman Act lands at the time of the patent in this case, but there was no market for such materials at that time due to the remote location. *See* Excerpts of Record ("ER") at 34-35. Location is key when it comes to determining the value of sand and gravel deposits, for low marginal profits and high transport costs make it important that supplies lie close to their market. Although sand and gravel extraction in Nevada was largely uneconomical for many years after enactment of the Pittman Act, expansion of the city of Las Vegas in the 1990s created a market for gravel in the area. *See* ER 34-35, 37.

Affordable sand and gravel supplies are essential ingredients in urban and suburban growth. Nevada is growing quickly, driven by Las Vegas development that makes it "one of the fastest growing cities in America." Patrick Barta, *Acres and Pains: Growing Scarcity Of Land Alters Home Economics*, WALL ST. J., Apr. 15, 2003 at A1. This growth makes the availability of afforable sand and gravel key to the economy of Nevada.

Petitioners are challenging the Ninth Circuit's over-broad construction of this Court's 1983 ruling in *Watt v. Western Nuclear* that a gravel deposit in Wyoming was reserved to the United States under the Stock-Raising Homestead Act of 1916 ("SRHA"). Using *Western Nuclear* as its vehicle, the Ninth Circuit converted the historically limited scope of statutory mineral reservations into a radical expansion of federal ownership of Pittman Act lands, at the expense of the reasonable expectations of private owners. Even when the term "valuable minerals" is afforded its broadest potential interpretation consistent with basic mineral law, common materials such as sand and gravel are regarded as "minerals" only when they have economic value *at the time of the patent*. Contrary to the decision below, *Western Nuclear* did not establish a broad *per se* rule that resolved all issues under federal statutory mineral reservations, or even gravel mineral reservations, or even all issues related to gravel reservations. *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (distinguishing *Western Nuclear* and remanding to district court to determine whether gravel was a mineral included in the reservation of an exchange patent issued under the Indian Reorganization Act of 1934). *See also, e.g.*, Jean Feriancek, *What Constitutes a Mineral?*, 15-SPG NAT. RESOURCES & ENV'T 261, 262 (2001) ("The *Western Nuclear* decision did not answer the question of gravel ownership on lands patented under statutes other than the SRHA, or as to minerals acquired by

the federal government through other means such as land exchange.").

Thus, although gravel is a vital economic resource today, because it was not valuable *at the time Petitioners' predecessors in interest received their patent*, the gravel at issue in this case should be construed as Petitioner's private property in light of the Pittman Act and conditions existing at the time of the conveyance at issue in this case. Sensitive to both the enormous impact of judgments about the scope of private versus federal mineral rights in the western United States, and the dangers of reflexive nationalization of property rules and property rights without regard to the interests at stake, this Court should grant this petition and review the Ninth Circuit's erroneous, overbroad, and dangerous interpretation of statutory mineral reservations.

II. The Ninth Circuit's Ruling Threatens Private Aggregate Extraction Operations That Remain Critical to the Health of the Nation's Economy, Federalizing Private Property Rights and Environmental and Other Controls

If left standing, the Ninth Circuit's decision will impair the sand and gravel industry in the western United States and its ability to contribute to the nation's economy. This industry serves an important role in all forms of economic activity, including the activities of and transactions with the members of AGCA, AGCC, and NWMA.

Sand and gravel are among the most common of earth's geological materials. In their natural state, sand and gravel can be loose and easily handled, composed of a range of grain sizes. Alternatively, sand and gravel are often produced by crushing common sandstone rock which is prevalent throughout the western United States. Sand and gravel are common materials for fills and as a base for

pavements, including interstate highways and local mine roads, as well as other structures. When combined with cement binders, sand and gravel become the principal ingredient in an unusually strong and long-lasting construction material – concrete – whether used in its plastic state and placed in forms, or precast as pipe, block and other structural components. When combined with asphalt, sand and gravel become the aggregate forming the major element of a widely used paving material, asphaltic concrete.

Sand and gravel are the most common materials used as aggregate. In fact, in some sections of the country – including the region served by Petitioners – these materials are the only viable source of aggregate. As natural deposit materials, sand and gravel are highly useful resources but only when they are relatively close to those locations where aggregates may be needed. Wherever communities, homes, and industrial operations have been established, sand and gravel are necessary as aggregates. The national annual consumption of aggregates including sand and gravel is more than ten tons per capita.

One essential aspect of sand and gravel operations lies in the economics of its extraction. Due to transportation costs, it is critical for the industry to utilize sand and gravel deposits near the market for these materials. Sand and gravel are bulky, heavy and relatively lost cost products. As such, these products can absorb little increase in hauling distance from extraction site to consumer without a prohibitive increase in delivered product cost. As a result, the majority of such extraction sites are close to the point of product use (usually within a metropolitan area where the demand for land and other uses is pressing and acute, like the ever-expanding areas in Nevada).

The inability of the industry to use locations which are subject to other uses – or taken outside of private ownership

– can only lead to increasing extraction and construction costs. "The fundamental problem of the industry, therefore, is that of securing the right to continue to produce sand and gravel for the construction industry at locations that are economically feasible." Nat'l Stone Sand and Gravel Association, *The Sand and Gravel Industry: A Valuable Resource – A Vital Construction Material*, available at http://www.nssga.org/whoweare/sandgravel.htm (visited July 31, 2003).

Compliance with current land use and other environmental controls – many supported by the aggregate mining, and construction industries – makes aggregate extraction an activity accepted by communities as a responsible contributor to the economy. Nevertheless, there are still difficulties in securing the right to produce sand and gravel because of local zoning ordinances, state acts, and federal controls affecting the industry's surface mining activities. The substantial capital investment required for modern sand and gravel plants is already a risky undertaking for the prospective producer without increased costs associated with federal property controls such as those created by the Ninth Circuit's ruling at issue here.

This investment will become all the more difficult (and, indeed, prohibitive in many cases) if the United States can now claim ownership to millions of acres of western deposits. Substantial past investments, reasonably made on the expectation of private ownership, will be lost; and many future investments and production activities will be entirely thwarted.

Moreover, under the Ninth Circuit's rationale, numerous aggregate operations – mostly local and regional businesses that have by long tradition operated under largely competent and responsible state and local control – will be subject also to federal authorities with strong bureaucratic interests in

extracting from them not only cash in the form of royalties from the newly-created federal ownership of sand and rock, but also compliance with a host of federal rules and regulations. Many of these will be duplicative of responsible controls already in place at the state and local level, and all of them will unnecessarily increase the costs of an activity with an already low marginal profit.

The imposition of federal ownership will require any private party seeking to gain access to federal "reserves" to deal now with the costly requirements of, and the delays associated with, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 *et seq.*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§470 *et seq.*, and many other federal controls – not to mention simply the cost of negotiating an extraction authorization from the federal government and the price the government will charge for access to its new lodes of gravel. This will require environmental assessments, species consultation, cultural resource assessments, novel royalty payments to the federal government, higher prices, and lower resource productivity for communities, businesses and homeowners, and others.

For example, in the case of Nevada, over 83 percent of the State's land base is already owned outright by the United States. *See* U.S. Dep't of Interior, PUBLIC LAND STATISTICS at Table 1-3 (2001). Now, as a result of the Ninth Circuit's ruling exaggerating this Court's prior ruling in *Watt v. Western Nuclear*, the United States will own the sand and gravel in all western lands with estates split between surface and mineral rights unless this Court intervenes.

The federal government would become the principal party in hundreds of common aggregate operations and discourage the extraction and use of these resources. This

outcome does not reflect the intent of the Pittman Act or our general public land policies which traditionally supported private ownership and dominion over lands conveyed.

III. The Ninth Circuit's Ruling is Erroneous and Offends Long-Standing and Fundamental Principles of Mining and Property Law

The Ninth Circuit misconstrued the rule acknowledged in *Western Nuclear*: Common materials can be identified as "minerals" only if they have economic value. Unless economic value exists at the time of the conveyance, common materials are not within the scope of "minerals" reserved. Land patentees should be entitled to know what has been granted at the time of the conveyance – only common materials of the requisite value at the time of the conveyance can be reserved.

Western Nuclear itself was an anomaly in public land law and a disturbance in private property rights – any continued reliance on, or expansion of its scope, should be suspect. "The *vast majority of courts* have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals." *Miller Land & Mineral*, 757 P.2d 1001, 1003 (Wyo. 1988).[2] In addition, contary to

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[2] *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954); *Miller Land & Mineral*, 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"); *Burkey*, 25 Ct. Cl. at 577 (sand and gravel not reserved); *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215,

(continued....)

the Ninth Circuit in the case at bar, "Most state courts have addressed the issue have concluded, like Wyoming, that ordinary sand and gravel are part of the surface estate" – thus, belonging to Petitioners in this case. Feriancek, *supra*, 15-SPG NAT. RESOURCES & ENV'T at 279.

Thus, the Ninth Circuit's decision splits from most cases that interpret mineral reservations as relates to sand and gravel. Most courts have seen *Western Nuclear* as an unusual decision, contrary to longstanding mining and property law precedents, and seen fit to limit it to its facts. In this case, the Ninth Circuit rather than recognizing the limited reach of *Western Nuclear* has breathed new life and reach into an otherwise anomalous case. This Court should

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(continued) . . .

1219 (7th Cir. 1983) (limestone not reserved where government acquired surface estate from private party). *Western Nuclear* has also been distinguished from cases involving lands patented pursuant to other *federal statutes* in which the scope of the reservation was not mandated in the statute itself. *See United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands"); *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 681 (10th Cir. 1986) (distinguishing *Western Nuclear* and observing "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]"); *Hess*, 194 F.3d at 1174 (to ascertain meaning of "minerals," court "must, as in *Poverty Flats*, look at the intent of the parties ... as used in the exchange patent at issue"). *See also* John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984); *Miller Land & Mineral*, 757 P.2d at 1003-04 (addressing whether gravel was reserved and commenting "[i]f there is [ ] confusion, we suspect that the [*Western Nuclear*] case is the culprit . . . .").

recognize state property law precedent and reject the Ninth Circuit's interpretation.

It is a fundamental tenet of property law that conveyances are to be interpreted at the time of the grant n accordance with the intent of the parties. *See* HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY §6.1 (5th ed. 2001). *See also, e.g.*, *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] *if it has the requisite value*. And there may be instances wherein a reservation of minerals has been made in past years and wherein the requisite *value was present and recognized to be so* in the minds of the parties.") (concurring opinion). Any other interpretation would create shifting private property rights whose security would simply be at the whim of the current market for particular minerals.

This fundamental concept is even stronger where Congress grants land and attempts to induce investment through the creation of private property rights. The *Western Nuclear* dissenters (Justices Powell, Rehnquist, O'Connor and Stevens) reasoned that "[i]n recommending 'citizen sovereignty' of the soil, Congress surely did not intend to destroy that sovereignty by reserving the commonplace substances that actually constitute much of that soil." 462 U.S. at 71-72. Here under the Pittman Act, Congress explicitly set out to induce private citizens to explore and develop the underground water resources of Nevada for the public good and to grant substantial lands "as a reward for [their] labors and expenditures." H.R. Rep. No. 66-286, at 1

(1919). To now deny rights to sand and gravel, simply as a result of changing conditions, would frustrate this intent of Congress to encourage development on Pittman Act lands.

As this Court has held, when Congress:

> offers to individuals or to corporations as an inducement to undertake and accomplish ... works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.

Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (citation omitted). The Ninth Circuit's ruling, if allowed to stand, would make citizens landowners subservient to the federal government rather than serve the purposes of the Pittman Act to encourage development in the West.

The Department of Interior itself acknowledged in the past that value should be determined at the time a patent is obtained, *not* at some later date. This interpretation should stand. When interpreting an analogous 1926 statutory mineral reservation, Interior concluded that only deposits valuable at the time of conveyance were reserved;

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown *as of the date of the allotment or patent* to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.

U.S. Dep't of the Interior, Solicitor Op. M-36379, at Summary (Oct. 3, 1956) (emphasis added) (cited in dissent of *Western Nuclear*, 462 U.S. at 67 n. 11 (Powell, J.,

dissenting)). The Solicitor explained that this rule does *not* limit the reservation of "other minerals having known *intrinsic mineral qualities and values*," but governs only reservations of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas." *Id.* at 4 (emphasis added). Interior thus recognized that sand and gravel were not intrinsically valuable minerals and would only be reserved when they had economic value at the time of conveyance.

If taken to its logical conclusion, the Ninth Circuit's decision would, in fact, make almost all surface rights granted under the Pittman Act subject to federal property, permission, and control. The Ninth Circuit's rationale could leave Pittman Act and other western surface landowners "with the dubious assurance that only the dirt itself could not be claimed by the Government. It is not easy to believe that Congress intended this result." *Western Nuclear*, 462 U.S. at 61 (Powell, J., dissenting). After all, the agricultural crops on Pittman Act lands can only exist and sustain by draining minerals from the soil. These minerals are thus "valuable" because they contribute to the health of the crops. The crops naturally extract these minerals. If the Ninth Circuit's broad rationale is sustained, then these crops should also be federal property – having extracted valuable minerals from the soil. Surely, this was not the intent of Congress. Surely, this Court should limit a ruling that would lead to such a result.

A final instructive factor favoring granting the Petition comes from this Court's recent decision in *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999). As *Amoco* explains, statutory mineral reservations are not ambiguous merely because they fail to conclusively include or exclude particular substances. Their meaning should not change because of new science. Similarly,

whether a deposit is "valuable" when a statutory mineral reservation becomes effective should not later change due to a fluctuating market. The common conception at the time of conveyance is key.

The *Amoco* Court addressed whether the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") located within coal formations. This Court held that "the *common conception* of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource." *Id.* at 874 (emphasis added). According to the Court:

> The question is not whether, *given what scientists know today*, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense."

Id. at 873 (emphasis added).

At the time the Pittman Act was passed and the patent at issue was granted, sand and gravel at the relevant site were not considered valuable minerals. The scope of property rights granted should not be allowed to change today simply because of alterations in markets and technology. Just as it was noted in *Leo Sheep*:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. ... This Court has traditionally recognized the special need for certainty and predictability

> where land titles are concerned, and we are unwilling to upset settled expectations....

Leo Sheep Co., 440 U.S. at 687 (citations omitted).

The Ninth Circuit's decision adversely affects private property rights. The Ninth Circuit's erroneous interpretation of *Western Nuclear* will govern property rights not just on those Pittman Act lands directly at issue, but on all lands patented under similar general statutory mineral reservations under at least thirteen federal statutes requiring the reservation of all minerals in certain conveyances by the United States. *See* 3 Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING § 9.05[2] (2d ed. 2002). This Court should grant this petition not only to resolve the Pittman Act issues involved here, but also to cut off the potential precedential effect of this case at the pass before the broad ruling is used to alter the rights of landowners throughout the West.

IV. The Ninth Circuit's Interpretation Would Lead to the Waste of Resources and Leave Economic Gravel Deposits Unexcavated and Unused

Resources should be channeled to their highest and best use.[3] As a matter of policy, congressional acts should be construed to accomplish this end and with a presumption in favor of private property rights. It is possible that – by resolving ownership in favor of the federal government – this case could lead to the waste of economically important

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[3] "The basic system of property rights is fundamental not only because it is comprehensive, but also because it allows resources to reach their highest and best use with the minimum level of friction." Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 193 (1992).

natural resources. Congress intended to reserve economically important natural resources for the purpose of allowing production of them. However, to construe common sand and gravel to be within the scope of that reservation actually impedes private development of the resources. In light of this reality, the Ninth Circuit's opinion should be reversed – especially as it is at least clear that Congress did not evince any certain intent that it wanted to retain such ownership to sand and gravel deposits.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: August 1, 2003

Respectfully submitted,

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